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11 SELECT PORTFOLIO SERVICING, INC., WELLS FARGO BANK, N.A., AS
12 TRUSTEE, ON BEHALF OF THE HOLDERS OF THE HARBORVIEW
13 MORTGAGE LOAN TRUST MORTGAGE LOAN PASS-THROUGH
14 CERTIFICATES, SERIES 2007-1 and NATIONAL DEFAULT SERVICING
15 CORPORATION

16 **UNITED STATES DISTRICT COURT**

17 **CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION**

18 MARSHALL S. SANDERS and LYDIA O. SANDERS AS TRUSTEE OF THE
19 MARSHALL AND LYDIA SANDERS TRUST DATED APRIL 20, 1990,

20 Plaintiffs,

21 vs.

22 BANK OF AMERICA, N.A.; WELLS
23 FARGO BANK, N.A., AS TRUSTEE, ON
24 BEHALF OF THE HOLDERS OF THE
25 HARBORVIEW MORTGAGE LOAN
26 TRUST MORTGAGE LOAN PASS-
27 THROUGH CERTIFICATES, SERIES 2007-1;
28 NATIONAL DEFAULT SERVICING
COPORATION; SELECT PORTFOLIO
SERVICING, INC.; and DOES 1-20

Defendants.

CASE NO. 8:15-cv-00935-AG-AS

Hon. Andrew J. Guilford

**DEFENDANTS' NOTICE OF
MOTION AND MOTION TO
DISMISS PLAINTIFFS'
COMPLAINT; MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

Date: October 26, 2015

Time: 10:00 a.m.

Place: Courtroom 10D

[Filed concurrently with: (1) Request
for Judicial Notice; and, (2)
[Proposed] Order]

Complaint Filed: June 11, 2015

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on October 26, 2015 at 10:00 a.m., or as
3 soon thereafter as the matter be heard in the above-entitled Court, Defendants Wells
4 Fargo Bank, N.A., as Trustee, on behalf of the Holders of the Harborview Mortgage
5 Loan Trust Mortgage Pass-Through Certificates, Series 2007-1 (“Wells Fargo”),
6 National Default Servicing Corporation (“NDSC”) and Select Portfolio Servicing, Inc.
7 (“SPS” and collectively, “Defendants”) will bring for hearing before the Honorable
8 Andrew J. Guilford, United States District Judge, in Courtroom 10D of the United
9 States District Court located at 411 West Fourth Street, Santa Ana, California 92701,
10 a Motion to Dismiss each purported cause of action in the Complaint of Plaintiffs
11 Marshall S. Sanders and Lydia O. Sanders as Trustee of the Marshall and Lydia
12 Sanders Trust Dated April 20, 1990 (“Plaintiffs”).

13 Defendants seek dismissal pursuant to Federal Rules of Civil Procedure 8(a)
14 and 12(b)(6) on grounds that Plaintiffs’ Complaint fails to state any claim against
15 Defendants upon which relief can be granted.

16 This Motion is based on this Notice of Motion and Motion, the incorporated
17 Memorandum of Points and Authorities, the pleadings, papers and records on file in
18 this action, and such oral argument as may be presented at the time of the hearing.
19 This Motion seeks dismissal of all of Plaintiffs’ claims in the Complaint against
20 Defendants.

21 Defendants file this Notice of Motion and Motion despite not having been
22 properly served with the Complaint by Plaintiffs.

23 Counsel for Defendants met and conferred with Plaintiffs’ counsel on August
24 19, 2015 pursuant to Local Rule 7-3. The parties were unable to reach an agreement
25 on the issues raised in this Motion.

1 Dated: August 21, 2015

Respectfully submitted,

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LOCKE LORD LLP

By: /s/ Aileen Ocon

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendants Wells Fargo Bank, N.A., as Trustee, on behalf of the Holders of the Harborview Mortgage Loan Trust Mortgage Pass-Through Certificates, Series 2007-1 (“Wells Fargo”), National Default Servicing Corporation (“NDSC”) and Select Portfolio Servicing, Inc. (“SPS” and collectively, “Defendants”) hereby submit the following Memorandum of Points and Authorities in Opposition to Plaintiffs Marshall S. Sanders and Lydia O. Sanders as Trustee of the Marshall and Lydia Sanders Trust Dated April 20, 1990’s (“Plaintiffs”) Complaint.

I. INTRODUCTION

This is Plaintiffs' last-gasp attempt at delaying a long overdue foreclosure on their property located at 1621 Kensing Lane, Santa Ana, California 92705 (the "Subject Property"). Plaintiffs have filed five bankruptcy cases in five years and a suit in 2014 in Orange County Superior Court. Now, in a shameless example of forum-shopping, Plaintiff is now seeking relief in federal court despite having voluntarily dismissed a virtually identical legal action against the same defendants in state court. There, the court awarded Plaintiffs a preliminary injunction conditioned upon Plaintiffs posting a bond in the amount of \$35,000 by June 2, 2015. Having failed to do so, Plaintiffs turn now to the federal court in hopes of setting up another roadblock to the lawful foreclosure of the property they have long-ago defaulted on. As explained fully herein, Plaintiffs' Complaint should be dismissed without leave to amend.

II. STATEMENT OF FACTS

A. Factual History

Plaintiffs' claims arise from a home mortgage loan secured against the Subject Property. On or about December 22, 2006, Plaintiffs obtained a mortgage loan from the originating lender Countrywide Bank, N.A. in the amount of \$1,435,000.00 and secured against the Subject Property with a Deed of Trust. (Complaint "Compl." ¶14-15, Exh. A and Request for Judicial Notice filed concurrently herewith ("RJN"),

1 Exh. 1.) The Deed of Trust securing the loan noted that ReconTrust Company, N.A.
 2 was the originating Trustee. *Id.* The Deed of Trust also noted that Mortgage
 3 Electronic Registration Systems, Inc. (“MERS”) is “acting solely as nominee” for the
 4 originating lender Countrywide Bank, N.A. *Id.*

5 A Corporate Assignment of Deed of Trust (“Assignment-1”) was executed on
 6 November 17, 2009 and recorded on December 30, 2009 in the Orange County
 7 Recorder’s Office, the effect of which assigned the beneficial interest in the Deed of
 8 Trust, together with all rights therein and thereto, to Wells Fargo Bank, N.A., as
 9 Trustee for HarborView Mortgage Loan Trust Mortgage Loan Pass-Through
 10 Certificates, Series 2007-1 (“Wells Fargo Trustee”). (Compl., ¶ 28; RJD, Exh. 2.)

11 Plaintiffs contend that on February 17, 2010, they sent a “Letter of Rescission”
 12 of the underlying loan to Countrywide Bank, N.A., Bank of America, and Wells
 13 Fargo. (Compl., ¶¶ 19-20, Exh. C.)

14 On November 28, 2011, an Assignment of Deed of Trust (“Assignment-2”) was
 15 executed and subsequently recorded in the Orange County Recorder’s Office on
 16 December 6, 2011. The effect of Assignment-2 was to transfer all beneficial interest
 17 in the Deed of Trust, together with all rights therein and thereto, to Bank of America,
 18 N.A., Successor by Merger to BAC Home Loans Servicing, LP f/k/a Countrywide
 19 Home Loans Servicing, LP. (Compl., ¶¶ 31-32; RJD, Exh. 3.)

20 On December 13, 2012, NDSC was substituted as Trustee of the Deed of Trust
 21 in place of ReconTrust Company, N.A. (RJD, Exh. 4.) On March 6, 2013, NDSC
 22 caused to be recorded a Notice of Default and Election to Sell Under Deed of Trust
 23 (“NOD”), which was recorded in the Official Records of Orange County. (Compl., ¶
 24; RJD, Exh. 5.) The NOD noted that as of March 5, 2013, Plaintiffs were
 25 \$341,963.57 in arrears on their loan. *Id.* The NOD contained the necessary
 26 declaration attesting to compliance with Cal. Civ. Code §2923.5. *Id.*

27 On June 25, 2014, a Corporate Assignment of Deed of Trust (“Assignment-3”)
 28 was executed, the effect of which assigned all beneficial interest in the Deed of Trust

1 to Wells Fargo Trustee. (Compl., ¶¶ 34-35; RJD, Exh. 6.) Assignment-3 was
 2 recorded in the Official Records of Orange County on July 9, 2014. *Id.*

3 On October 28, 2014, NDSC executed a Notice of Trustee's Sale ("NOTS"),
 4 which was recorded in the Official Records of Orange County on October 29, 2014.
 5 (RJD, Exh. 7.)

6 **B. Procedural History**

7 **1. Plaintiffs' Five Chapter 11 Bankruptcy Cases**

8 On April 12, 2010, Plaintiff Marshall Sanders ("Plaintiff") filed for relief under
 9 chapter 13 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the
 10 "Bankruptcy Code") in the United States Bankruptcy Court for the Central District of
 11 California, Santa Ana (the "Bankruptcy Court"), Case No. 8:10-bk-14682-ES (the
 12 "First Bankruptcy Case"). (RJD, Exh. 8.) The First Bankruptcy Case was converted
 13 to a case under chapter 7 on April 26, 2010 and Plaintiff obtained a discharge on
 14 February 2, 2011. (*Id.*) The First Bankruptcy Case was closed on September 9, 2011.
 15 (*Id.*)

16 Approximately a month after the closure of the First Bankruptcy Case, Plaintiff
 17 filed for relief again, this time under chapter 11 of the Bankruptcy Code, in the
 18 Bankruptcy Court, Case No. 8:11-bk-24594-ES (the "Second Bankruptcy Case").
 19 (RJD, Exh. 9.) The Second Bankruptcy Case was dismissed on August 21, 2013
 20 pursuant to 11 U.S.C. § 1112(b) by order entered by the Bankruptcy Court. (RJD,
 21 Exh. 9.). The Plaintiff appealed the dismissal of the Second Bankruptcy Case, which
 22 decision of the Bankruptcy Court ("BAP") was affirmed by the Bankruptcy Appellate
 23 Panel on May 30, 2013. (RJD, Exh. 9.)

24 Prior to the decision of the BAP, on May 7, 2013, Plaintiff filed for relief again
 25 under chapter 11 of the Bankruptcy Code in the Bankruptcy Court, Case No. 8:13-bk-
 26 14049-ES (the "Third Bankruptcy Case"), which case was dismissed on October 4,
 27 2013. (RJD, Exh. 10.) The dismissal of the Third Bankruptcy Case was also

1 appealed, this time to the United States District Court. (*Id.*) The District Court
 2 dismissed the appeal on April 11, 2014. (*Id.*)

3 Approximately a month prior to the dismissal of the appeal by the District
 4 Court, Plaintiff again filed for relief under chapter 11 of the Bankruptcy Code in the
 5 Bankruptcy Court, Case No. 8:14-bk-11663-ES (the “Fourth Bankruptcy Case”).
 6 (RJN, Exh. 11.) On August 26, 2014, Wells Fargo filed a motion for relief from the
 7 automatic stay (the “Motion for Relief”). (RJN, Exh. 12.) The Fourth Bankruptcy
 8 Case was dismissed on September 18, 2014 by the Bankruptcy Court. (RJN, Exh. 13.)
 9 Additionally, the Bankruptcy Court barred the Plaintiff from filing another bankruptcy
 10 case for 180 days. (*Id.*) As a result of the dismissal of the Fourth Bankruptcy Case,
 11 the Bankruptcy Court denied the Motion for Relief as moot. (RJN, Ex. 14.)

12 Notwithstanding the Bankruptcy Court’s 180-day bar, on June 15, 2015,
 13 Plaintiff filed for relief under chapter 13, in the Bankruptcy Court, Case No. 8:15-bk-
 14 13011-ES (the “Fifth Bankruptcy Case”)¹. (RJN, Exh. 15.) In the voluntary petition
 15 (nothing more than a skeleton petition), Plaintiff asserts, under penalty of perjury, that
 16 his assets and liabilities do not exceed \$50,000 (*Id.*), despite making this entire case
 17 about the Subject Property, on which the secured debt exceeds at least \$1.5 million,
 18 well above the threshold limits of section 109(e) of the Bankruptcy Code. (RJN, Exh.
 19 12.) Plaintiff failed to disclose all of his prior bankruptcy cases within the past 8 years
 20 in his voluntary petition, again, under penalty of perjury. (RJN, Exh. 15.) Importantly,
 21 Plaintiff failed to include the Third Bankruptcy Case and the Fourth
 22 Bankruptcy Case, the latter of which was dismissed with a 180 day bar from refiling
 23 by this Court.

24 In the Fifth Bankruptcy Case, Plaintiff filed a Motion in Individual Case for
 25 Order Imposing a Stay or Continuing the Automatic Stay as the Court Deems
 26

27 ¹ The Fifth Bankruptcy Case was filed less than two weeks after the Plaintiff failed to
 28 post a bond for a preliminary injunction in the State Court Action and requested a
 dismissal of the case, and just three days after this Court denied Plaintiff’s *ex parte*
 request for a TRO.

1 Appropriate to extend the automatic stay under section 362 of the Bankruptcy Code as
 2 to all creditors. (RJN, Exh. 16.) Defendants filed an Opposition. On July 7, 2015,
 3 the Bankruptcy Court issued a tentative ruling, adopted as final, denying the
 4 Plaintiff's Motion. (RJN, Exh. 17.)

5 **2. Plaintiff's State Court Action**

6 On November 21, 2014, Plaintiffs Marshall S. Sanders and Lydia O. Sanders, as
 7 Trustee of the Marshall and Lydia Sanders Trust Dated April 20, 1990 filed a
 8 complaint against Defendants SPS, NDSC, Bank of America, N.A. ("BANA"), and
 9 Doe defendants 1 through 20 relating to a mortgage loan that is secured by real
 10 property located at 1621 Kensing Lane, Santa Ana, California 92705. Styled *Sanders,*
 11 *et al. v. Bank of America, N.A.*, and assigned Orange County Superior Court Case No.
 12 30-2014-00757782, Plaintiff's lawsuit raised claims for (1) Cancellation of
 13 Instruments pursuant to Civil Code §3412; (2) Violation of Business and Professions
 14 Code Section 17200; (3) Violation of California Civil Code Section 2924a(6) and
 15 (f)(3); (4) Declaratory Relief; (5) Violation of California Civil Code Sections 2923.5
 16 and 2923.55 ("State Court Action").

17 On May 18, 2015, the court granted Plaintiffs' request for a preliminary
 18 injunction. The court's order was conditioned upon Plaintiffs' posting a bond in the
 19 amount of \$35,000 within fifteen (15) days of the court's ruling, or June 2, 2015.
 20 Plaintiffs failed to do so. (RJN, Exh. 18.)

21 On June 1, 2015, the state court overruled in part and sustained in part
 22 Defendants' demurrer. (RJN, Exh. 19.) Plaintiffs were given until June 16, 2015 to
 23 file an amended complaint as to their third cause of action for Violation of California
 24 Civil Code Section 2924 only. (*Id.*) However, on June 9, 2015, instead of filing an
 25 amended complaint, Plaintiffs filed a Request for Dismissal without prejudice of the
 26 entire state action. (RJN, Exh. 20.)

3. The Instant Federal Court Action

On June 11, 2015, Plaintiffs filed this complaint in United State District Court, C.D. Cal. against Defendants and BANA. Plaintiffs' Complaint not only names virtually the same parties² as the State Court Action, but it also is based on virtually the same factual allegations and claims³. Plaintiffs also filed an Ex Parte Application for a Temporary Restraining Order ("TRO"). On June 12, 2015, this Court denied Plaintiffs' request for a TRO. (June 12, 2015 Civil Minutes, Dkt. # 10.)

III. ARGUMENT

A. Legal Standard

A Rule 12(b)(6) dismissal may be based on either “the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (internal citation omitted). Federal Rule of Civil Procedure 8(a)(2) requires that a complaint must “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” Fed. R. Civ. P. 8(a)(2); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S. Ct. 992, 998 (2002). Broad allegations that fail to specify which individual defendants are responsible for which wrongful conduct are insufficient under Rule 8(a). *In re Sargent Tech., Inc.*, 278 F. Supp. 2d 1079, 1094 (N.D. Cal. 2003). Where a complaint fails to provide grounds for her or her entitlement to relief, it must be dismissed. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1964-65 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009). A complaint containing mere “labels and conclusions,” or “formulaic recitations of the elements of a cause of action” will not suffice to overcome a motion to dismiss. *Twombly*, 127 S. Ct. at 1964-65. Moreover, “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Id.*

Nor can Plaintiff merely lump Defendants together in contravention of Rule

² Wells Fargo is not named as a party in the State Court Action.

³ Plaintiffs do not raise a claim for rescission under 15 U.S.C. §1635 in the State Court Action, but all other claims remain the same. 6

1 8(a), not specifying which defendant is allegedly responsible for what conduct. *See*
 2 *Gauvin v. Trombatore*, 682 F. Supp. 1067, 1071 (N.D. Cal. 1988); *Aaron v. Aguirre*,
 3 2007 WL 959083, at *16 (S.D. Cal. Mar. 8, 2007); *In re Sargent Tech, Inc.*, 278 F.
 4 Supp. 2d 1079, 1094 (N.D. Cal. 2003) (complaint failed to state a claim “because
 5 plaintiffs do not indicate which defendant or defendants were responsible for which
 6 alleged wrongful act”); *PLS-Pacific Laser Sys. V. TLZ Inc.*, 2007 WL 2022020, at *11
 7 (N.D. Cal. Jul. 9, 2007). A plaintiff must specifically identify the parties to the
 8 alleged activities so that each defendant is advised of the claims it must defend. *See*,
 9 e.g., *Gen-Probe*, 926 F. Supp. 948, 960 (S.D. Cal. 1996) .

10 Finally, “the court need not accept allegations as true if they are contradicted by
 11 documents before the court.” *Hawkins v. First Horizon Home Loans*, No. 10-1876,
 12 2010 WL 4823808, *9 (E.D. Cal. Nov. 22, 2010); *see also Sprewell v. Golden State*
 13 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (a court need not “accept as true
 14 allegations that contradict matters properly subject to judicial notice or by exhibit”).

15 In failing to specify actual facts in support of his allegations, and failing to
 16 identify which of the Defendants actually engaged in the alleged wrongful conduct,
 17 Plaintiffs’ Complaint falls woefully short of the minimum pleading requirements and
 18 fails to provide Defendants with adequate notice of what conduct is alleged against
 19 them that entitles Plaintiff to relief.

20 **B. Plaintiffs’ Claim For Rescission Under 15 U.S.C. §1635 is Time
 21 Barred.**

22 Plaintiffs’ first cause of action is premised on his claim for rescission and/or
 23 damages under the Truth in Lending Act (“TILA”) based on Plaintiffs’ allegations that
 24 via a letter dated February 17, 2010, they requested rescission of their mortgage loan,
 25 but “[n]one of the Defendants responded.” (Compl., ¶¶38-39.)

26 Plaintiffs’ claim should be dismissed, however, because it is time-barred under
 27 TILA. A damages action under TILA must be brought within one year of the alleged
 28 violation. 15 U.S.C. § 1640(e) (“Any action under this section may be brought . . .

1 within one year from the date of the occurrence of the violation.”). To exercise his
 2 right to rescission, a borrower must give written notice to a creditor within three years
 3 of consummation of the loan. 15 U.S.C. § 1635(f); *Jesinoski v. Countrywide Home*
 4 *Loans, Inc.*, 135 S. Ct. 790, 792 (2015). Any action to enforce the rescission or seek
 5 damages for failure to accept rescission must be filed within one year of the creditor’s
 6 refusal to accept rescission. *Gilbert v. Residential Funding LLC*, 678 F.3d 271, 278–
 7 79 (4th Cir. 2012); *see also Sherzer v. Homestar Mortgage Servs.*, 707 F.3d 255, 266,
 8 n.8 (3d Cir. 2013). If the creditor fails to respond, the one-year period begins 20 days
 9 after the request for rescission, when the response from the creditor was due. 15
 10 U.S.C. § 1635(f); *see also Gilbert*, 678 F.3d at 278–79.

11 Here, while Defendants fully dispute receipt of the ***unsigned*** February 17, 2010
 12 correspondence attached as Exhibit C to Plaintiff’s Complaint, even assuming
 13 *arguendo* that it was received and Defendants failed to respond, Plaintiffs still cannot
 14 succeed on their claim. The one-year statute of limitations is triggered 20 days after
 15 Plaintiffs’ February 17 request, or March 9, 2010. Plaintiffs would have therefore
 16 been required to file suit on or before March 9, 2011 in order to meet the relevant
 17 statute of limitations. Plaintiffs’ claim—raised for the first time in this federal court
 18 complaint—is therefore barred by the relevant statute of limitations.

19 To the extent Plaintiffs seeks any damages for purported violations of TILA,
 20 this action was commenced far beyond the one-year period after their loan was
 21 consummated in 2006. In sum, Plaintiffs’ TILA claim, whether for rescission or
 22 damages, is untimely and subject to immediate dismissal. *See Monaco v. Bear*
 23 *Stearns Residential Mortg. Corp.*, 554 F. Supp. 2d 1034, 1039 (C.D. Cal. 2008)
 24 (dismissing TILA damages claim as time-barred where suit was initiated more than
 25 one year after closing).

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C. Plaintiffs' Claims For Cancellation of Instruments, Violation of Business and Professions Code §17200, And Violation of Civil Code §2924 Fail As a Matter of Law.

Plaintiffs' causes of action for cancellation of instruments, violation of Business and Professions Code §17200, and violation of Civil Code §2924 are all predicated on Plaintiffs' theory of a purported broken "chain of title" arising from alleged improper assignments of title, which, Plaintiffs' posit, strip Defendants of their authority to foreclose on Plaintiffs' property. (*See* Compl., ¶¶ 27-36, 41-43, 48-51, 62-64.) But, as further explained below, Plaintiffs fail to state any cause of action because California law does not require the beneficiary of a deed of trust to establish a chain of title in order to prove that it has standing to foreclose.

Indeed, Plaintiffs utterly misunderstand the purpose and legal effect of a recorded assignment of deed of trust. Under California law, the Deed of Trust follows the note. “The assignment of a debt secured by mortgage carries with it the security.” Cal. Civ. Code § 2936; *Domarad v. Fisher & Burke, Inc.*, 270 Cal. App. 2d 543, 553 (1969) (“we note the following established principles: that a deed of trust is a mere incident of the debt it secures and that an assignment of the debt ‘carries with it the security.’” (quoting § 2936 and collecting cases on point)). Thus, assignments of notes or deeds of trust need never be recorded to (1) be effective between the parties or (2) non-judicially foreclose. *See Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal.App.4th 256, 272 (2011). As the Court of Appeal in *Fontenot* noted, “the lender could readily have assigned the promissory note . . . in an unrecorded document that was not disclosed.” *Id.*; *see also Herrera v. Federal Nat. Mortg. Assn.*, 205 Cal.App.4th 1495, 1506 (2012) (same); *Calvo v. HSBC Bank USA, N.A.*, 199 Cal.App.4th 118, 121-22 (2011) (assignments of deeds of trust need not be recorded “for the assignee to exercise the power of sale”); *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal.App.4th 497, 515 (2013) (borrower is “not the victim” of an invalid transfer because “her obligations under the note remained unchanged” and therefore

1 there is no viable cause of action); *Cho v. Citibank, N.A.*, No. 12-1410, 2012 WL
 2 3076537, at *5 (S.D. Cal. July 30, 2012) (“[N]otes ... do not have to be recorded in
 3 public records.”). Therefore, the date of the recording of an assignment (if one is
 4 recorded), does not indicate the date upon which the interest in a note and deed of
 5 trust passes to another party. It is merely a document that reflects for the public that
 6 such a transfer has taken place.

7 California law is clear that there is no requirement that a “chain of title” be
 8 produced to a borrower’s satisfaction in order to foreclose. California courts have
 9 “uniformly” held that it is not necessary to produce a “chain of ownership” to proceed
 10 in foreclosure. *See Dennis v. Wachovia Bank, FSB*, No. 10-01596 CW, 2011 WL
 11 181373, at *7-8 (N.D. Cal. Jan. 19, 2011) (finding that “[u]niformly among courts,
 12 production of the note is not required to proceed in foreclosure and similarly no
 13 production of any chain of ownership is required,” holding that, “[t]herefore, any
 14 claim that Defendant lacks standing to foreclose is summarily adjudicated in favor of
 15 Defendant”) (quoting *Roque v. Suntrust Mortgage, Inc.*, No. C09-00040RMW, 2010
 16 WL 546896, at *3 (N.D. Cal. Feb. 10, 2010)); *Pajarillo v. Bank of America*, No.
 17 10CV937 DMS (JMA), 2010 WL 4392551, at *8 (S.D. Cal. Oct. 28, 2010)
 18 (“Plaintiffs allege ... [that] Defendants are not entitled to foreclose upon their property
 19 because they cannot show a full chain of title. Plaintiffs’ claim, however, is belied by
 20 the language of their Deed of Trust and California’s foreclosure statutes.”) (citations
 21 omitted). The argument is absolutely meritless.

22 Defendants acknowledge that one California court has adopted the minority
 23 view on the issue, namely *Glaski v. Bank of America, N.A.*, 218 Cal. App. 4th 1079
 24 (2013). But nearly every court considering *Glaski* has expressly rejected its holding.
 25 “Notwithstanding *Glaski*, we reject the argument that the assignment of the \$1.155
 26 million note and deed of trust to a mortgage investment pool is a ‘get out of debt’ card
 27 for appellant.” *Boyce v. T.D. Serv.* 235 Cal. App. 4th 429 (2015). Another court
 28 noted, “*Glaski* is in a clear minority on the issue. Until either the California Supreme

Court, the Ninth Circuit, or other appellate courts follow *Glaski*, this Court will continue to follow the majority rule.” *Newman v. Bank of New York Mellon*, 2013 WL 5603316, at *3 n.2 (E.D. Cal. Oct. 11, 2013) (citing *Toneman v. United States Bank*, 2013 U.S. Dist. LEXIS 98966, *30–*31 (C.D. Cal. June 13, 2013) and *Jenkins*, 216 Cal. App. 4th at 515). The Bankruptcy courts of California have also rejected *Glaski*. See, e.g., *In re Sandril*, 501 B.R. 369 (Bankr. N.D. Cal. 2013) (“A majority of district courts in California have held that borrowers do not have standing to challenge the assignment of a loan”).

Even if Plaintiffs could challenge the transfers of the Note and assignments of the Deed of Trust, Plaintiffs must allege resulting prejudice to state any claim. See *Siliga v. Mortgage Electronic Registration Systems, Inc.*, 219 Cal. App. 4th 75, 85 (2013) (“Absent any prejudice, [plaintiffs] have no standing to complain about any alleged lack of authority or defective assignment.”); *Herrera*, 205 Cal. App. 4th at 1507-1508 (“Even assuming plaintiffs can allege specific facts showing that [the] assignment[s] of the DOT . . . were void, . . . plaintiffs must also show plaintiffs were prejudiced”).

Here, Plaintiffs have not and cannot contest that payments were due on the loan, nor do they claim that more than one entity has concurrently attempted to collect mortgage payments. Plaintiffs have alleged no facts that would otherwise suggest they have suffered prejudice. Thus, even if the assignments of the Deed of Trust or transfers of the Note were somehow defective as claimed and Plaintiffs could complain about the defects, the only damaged party would be “the [assignor], which . . . suffered the unauthorized loss of a [valuable] promissory note.” See *Herrera*, 205 Cal. App. 4th at 1508; see also *Jenkins*, 216 Cal. App. 4th at 515 (“As to plaintiff, an assignment merely substituted one creditor for another, without changing her obligations under the note.”) (quoting *Herrera*, 205 Cal. App. 4th at 1507); *Ghuman v. Wells Fargo Bank, N.A.*, No. 12-00902, 2012 WL 2263276, *3 n.2 (E.D. Cal. June

1 15, 2012) (applying *Herrera* and finding that plaintiffs were not prejudiced from
 2 allegedly invalid deed of trust assignment).

3 For these reasons, Plaintiffs' claims based on allegedly defective assignments of
 4 the Deed of Trust or transfers of the Note fail as a matter of law, and Plaintiffs' *ex*
 5 *parte* application must be denied.

6 **D. Defendants Have Complied With Civil Code §§ 2923.5, 2923.55.**

7 Judicially noticeable documents establish Defendants' compliance with the
 8 requirements of Civil Code §§ 2923.5 and 2923.55. Indeed, the March 6, 2013 Notice
 9 of Default includes the required declaration demonstrating that the lender or servicer
 10 has contacted the borrower or has tried with due diligence to contact the borrower.
 11 (Compl., Exh. D; RJD, Exh. 5, p. 2.) Even a cursory review of the document—which
 12 Plaintiffs themselves incorporate as Exhibit D to their Complaint—provides on p. 2:

13 The undersigned mortgagee, beneficiary or authorized agent for the
 14 mortgagee or beneficiary pursuant to California Code §2923.55
 15 declares that the mortgagee, beneficiary or the mortgagee's or
 16 beneficiary's agent has either contacted the borrower or tried with due
 17 diligence to contact the borrower as required by California Civil Code
 18 2923.55.

19 (Complaint, Exh. D, p. 2; RJD, Exh. 5, p. 2.) The declaration was dated March 5,
 20 2013 and signed by Julie Good on behalf of National Default Servicing Corporation,
 21 the substituted Trustee on Plaintiffs' Deed of Trust. (*Id.*) The Declaration confirms
 22 compliance with the statute. *Id.*; *see also Ortiz v. Accredited Home Lenders, Inc.*, 639
 23 F. Supp. 2d 1159, 1166 (S.D. Cal. 2009) (claim under section 2923.5 dismissed where
 24 declaration of compliance accompanied the Notice of Trustee's Sale attached to the
 25 complaint). There is no statute or case law that requires more than the attached
 26 declaration. *See Mabry v. Super. Ct.*, 185 Cal. App. 4th 208, 214–15 (2010) (“There
 27 is no indication that the Legislature wanted to saddle lenders with the need to ‘custom
 28 draft’ the statement required by the statute in notices of default.”); *see also Maguca v.*
Aurora Loan Services (C.D. Cal. Oct. 28, 2009) No. SACV 09-1086 JVS (ANx), 2009
 WL 3467750, *2 (taking judicial notice of a recorded copy of the notice of default and

1 dismissing a Section 2923.5 claim with prejudice “because the allegations in the FAC,
 2 which the Court notes are conclusory, are contradicted by the notice of default” (citing
 3 *Fortaleza v. PNC Financial Servs. Group, Inc.* (N.D. Cal. July 27, 2009) No. C 09-
 4 2004, 2009 WL 2246212, *2-4; *Kamp v. Aurora Loan Servs.* (C.D. Cal. Oct. 1, 2009)
 5 No. SACV 09-844-CJC, 2009 WL 3177636, *2).)

6 Furthermore, while Defendants vigorously dispute any claim that they failed to
 7 comply with the Civil Code’s requirements prior to recording the March, 2013 Notice
 8 of Default, the record in the State Court Action—which this Court may judicially
 9 notice—establishes Defendants’ compliance with the statute and renders Plaintiffs’
 10 claim moot. (See RJN, Exh. 8.) The statutes merely require that a servicer shall
 11 “assess the borrower’s financial situation and explore options for the borrower to
 12 avoid foreclosure.” Cal. Civ. Code § 2923.55(b)(2). Courts evaluating that same
 13 requirement in Civil Code § 2923.5 have repeatedly held that “[t]he lender’s
 14 obligations under Section 2923.5 to ‘assess’ the borrower’s’ financial situation and
 15 ‘explore’ options to avoid foreclosure can be satisfied by simply asking the borrower
 16 ‘why can’t you make your payments?’ and ‘telling the borrower the traditional ways
 17 that foreclosure can be avoided’” *Mora v. U.S. Bank N.A.*, No. 11-6598, 2012 WL
 18 2061629, *3 (N.D. Cal. June 7, 2012) (quoting *Mabry v. Superior Court*, 185
 19 Cal.App.4th at 232).⁴ It does not require that a borrower be reviewed for a loan
 20 modification, let alone be granted a loan modification.

21 In the event of a breach, Section 2923.5 provides only one remedy: delay of a
 22 pending foreclosure sale to allow the lender to comply with the statute. *Mabry*, supra,
 23 185 Cal. App. 4th at 214 (right of action under Section 2923.5 is limited to obtaining
 24 postponement of impending foreclosure to permit lender to comply). Here, no
 25 foreclosure has taken place. But even if Plaintiffs could state facts demonstrating non-
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27 ⁴ See also *Dubin v. BAC Home Loans Servicing*, No. 10-0506, 2011 WL 794995, *3 (N.D. Cal.
 28 Mar. 1, 2011) (“The requirements of section 2923.5 are narrow, and do not require the lender to have
 much more than minimal contact with a debtor to assess the debtor’s position and inform them of
 various options.”) (citation omitted))

1 compliance with §§ 2923.5 and 2923.55, Plaintiffs cannot allege they were prejudiced.
 2 Indeed, Plaintiffs' meritless challenge to the foreclosure cannot overcome their
 3 substantial default on their \$1 million+ mortgage, and thus, do not demonstrate any
 4 prejudice from any irregularity in the foreclosure process. *See Fontenot v. Wells*
 5 *Fargo Bank N.A.*, *supra*, 198 Cal. App. 4th at 272 (2011) (plaintiffs cannot allege
 6 prejudice when they concede default); *see also Herrera v. Federal National Mortgage*
 7 *Assn.*, *supra*, 205 Cal. App. 4th at 1501 ("Prejudice is not presumed from 'mere
 8 irregularities' in the process."). Accordingly, Plaintiffs' claim for a violation of Cal.
 9 Civ. Code §2923.5 and §2923.55 fail.

10 **IV. CONCLUSION**

11 For the foregoing reasons, each of Plaintiffs' causes of action fails. Defendants
 12 respectfully request that the Court grant the Motion to Dismiss in its entirety without
 13 leave to amend, and grant such further relief as the Court deems just and proper.

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 15 Dated: August 21, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Aileen Ocon, an attorney, do hereby certify that on August 21, 2015, I caused a copy of the foregoing **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** to be served through the Court's Case Management/Electronic Case Files (CM/ECF) system upon all persons and entities registered and authorized to receive such service.

Dated: August 21, 2015

By: /s/ *Aileen Ocon*

Aileen Ocon

Locke Lord LLP
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Los Angeles, CA 90071